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No. 627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JAMES O. PHIPPS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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JAMES O. PHIPPS,

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vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

James O. Phipps, petitioner herein, prays that a writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Ohio entered in the case of State of Ohio—vs—James O. Phipps on May 12, 1965 and denying a motion for rehearing on June 23, 1965, being Case Number 39361.

OPINIONS BELOW

The Journal Entry of judgment of conviction of the Court of Common Pleas of Scioto County, Ohio is unreported and appears in the transcript of the record.

The opinion of the Court of Appeals of the 4th Judicial District of Ohio (Scioto County) is unreported and appears herein as Appendix A.

The dismissal of the appeal by the Supreme Court of Ohio is unreported and is printed herein as Appendix B. The denial of the hearing thereon by the Supreme Court of Ohio is unreported and is printed herein as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Ohio denying rehearing was entered on June 23, 1965. The jurisdiction of the Court is invoked under 28 USCA Section 1257 (3).

QUESTIONS PRESENTED

WHERE A GRAND JURY WHICH IS NOT IMPANELED ACCORDING TO LAW RETURNS A CRIMINAL INDICTMENT, DOES THE SUBSEQUENT TRIAL AND CONVICTION OF A DEFENDANT UPON SUCH INDICTMENT DEPRIVE SUCH DEFENDANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Volume 1 USC; Section 1, Clause 3, Amendment 14 Constitution of the United States, Page XLVII.

2. Page's Ohio Revised Code Volume Appendix, Article 1, Section 10, Constitution of Ohio, Page 368.

3. Page's Ohio Revised Code Volume 29, O.R.C. Section 2939.17, Page 254.

STATEMENT OF THE CASE

On the 1st day of June, 1962, the Grand Jury for the May Term of 1962, that was under summons to appear for duty on Monday, the 4th day of June, 1962, was by order of the Honorable Lowell C. Thompson, discontinued for the re-

cited reason in said entry, that it was unnecessary that said Grand Jury appear for the reason that a Special Grand Jury had been ordered due to the needs of public business. (See Appendix D.) On the same day, June 1, 1962, said Judge by general entry of that date, ordered the Clerk of the Common Pleas Court to draw from the jury wheel, the names of 16 persons to serve as a Special Grand Jury and that they be directed to appear before the Court of Common Pleas of said county on the 6th day of June, 1962, at 9:30 A.M. (See Appendix E.) Thereafter, said body convened and on the 3rd day of July, 1962, among other findings returned indictment in this cause against the defendant, charging in Three Counts—the use of a false and fictitious name in an application for a Certificate of Title to a certain motor vehicle, the giving of a false and fictitious address in such application and the forgery of an assignment of certificate of title to a certain motor vehicle—all in violation of Section 4505.19 of the Revised Code of Ohio.

The defendant, James O. Phipps, filed separate special pleas to the alleged indictment objecting to the jurisdiction of the Common Pleas Court as to the subject matter set out in the alleged indictment on the ground that the alleged Special Grand Jury had no legal existence. The Honorable Thomas Mitchell who was under asignment as Judge of the Common Pleas Court of Scioto County, Ohio, ruled that the objections thus raised were not jurisdictional and ordered this cause assigned for trial, after plea of not guilty by the defendant.

Thereafter, the defendant, James O. Phipps, with two other defendants in separate criminal causes, petitioned the Supreme Court of Ohio for a Writ of Prohibition asking that the Common Pleas Court of Scioto County, Ohio, be restrained from proceeding with this cause for want of jurisdiction in respect to the subject matter contained in

the present indictment by reason of the contention of defendant that the alleged Special Grand Jury never had any legal existence. The Supreme Court allowed a temporary Writ of Prohibition and thereafter a demurrer was filed by the Honorable Lowell C. Thompson, one of the resident Judges of the Common Pleas Court of Scioto County, Ohio. Judge Mitchell, as Judge of said Court by assignment, also demurred to the petition. After hearing, the Supreme Court sustained the demurrer on the grounds that this defendant and the others, joining as relators, had an adequate remedy by way of appeal, and stated in their Per Curiam opinion that:

> "This Court will ordinarily in the exercise of its discretion deny a Writ of Prohibition where relator has an adequate remedy in the ordinary course of the law."

The within cause was then again assigned for trial in the Common Pleas Court of Scioto County, Ohio, with the Honorable Judge Thomas Mitchell presiding. The defendant was found guilty, after jury trial, on all Three Counts contained in said indictment and defendant was sentenced to incarceration.

The stipulation contained in Appendix F was made a part of the record.

An appeal was perfected to the Court of Appeals for Scioto County, Ohio. That Court affirmed the trial court. (See Appendix A.) Thereupon an appeal as of right and a motion for leave to appeal were filed with the Ohio Supreme Court. In the Ohio Supreme Court, both the Ohio Constitutional and the United States Constitutional questions were argued, but both appeals were dismissed. (See Appendix B.) A motion for rehearing was denied. (See Appendix C.)

The Supreme Court of Ohio dismissed the appeal for the reason the case contains no debatable constitutional question.

REASON FOR GRANTING THIS WRIT

The Supreme Court of the State of Ohio, by dismissing the appeal of this petitioner, has, upon execution of his sentence, deprived the petitioner of his liberty without due process of law.

ARGUMENT

The argument in this case is a relatively simple but a basically fundamental one. The question presented appears, after extensive research, to be one of first impression for this Honorable Court. For the purpose of argument, it is presented in two segments:

I. If the petitioner was convicted and sentenced upon an indictment returned by a grand jury which was not legally constitutited, was he deprived of due process of law?

II. If so, was the grand jury in question legally constituted?

We respectfully submit the answer to the first question is in the affirmative and the answer to the second question is in the negative.

The pertinent portion of the Fourteenth Amendment to the United States Constitution, Section 1, Clause 3, provides:

"Nor shall any state deprive any person of life, liberty, of property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of Ohio, in Article 1, Section 10, (see Appendix G), provides in pertinent part that:

*"*** no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law."*

If an individual has a constitutional right to be held to answer for an infamous crime *only* upon a presentment or indictment of a grand jury, it would seem to follow as a

necessary corollary that he has a constitutional right to be indicted by a *legally constituted* grand jury.

In *Reece v. Georgia, 350 U.S. 85,* on a question of selection of individual members of a grand jury, this Honorable Court stated:

"This Court over the past 50 years has adhered to the view that valid grand jury selection is a constitutionally protected right."

Does it not go without saying that the impaneling of an entire grand jury should be as much, if not more, constitutionally protected?

The highest Courts of at least two states have passed upon this question in general terms.

In *State v. Doherty, 60 Maine 504 (1872),* in discussing a venire drawn by a court without authority and a statutory attempt to validate the proceedings, stated: "A statute purporting to confirm and make valid court proceedings on indictments found by a grand jury not legally drawn, impaneled, and sworn is in contravention of this clause as depriving persons of liberty without due process."

The Court continued at page 511:

"If the respondent had been tried, convicted, sentenced, and imprisoned under this indictment, it is clear that he would have been deprived of his librty without due process of law and contrary to the law of the land."

In Louisana, it has been held:

"'The proper administration of justice requires impartial and unobstructed conduct at every phase of the criminal process, including the proceedings in the grand jury sessions. *** Since he (the accused) has no right in so far as that body is concerned except the right to have it duly impaneled and conducted according to law, his right in this respect should be rigorously protected." (Parenthetical

matter added). *State of Louisana v. Revere, 232 La. 134, 94 So. (2d) 25 at page 31.*

The case most directly in point which we have been able to find arose in the United States District Court for the District of Columbia in 1964 and is cited as *United States of America vs. Wallace and Tiernan Inc., et al., 234 Fed. Supp. 780.* In that case, the District Judge who called the grand jury allegedly did not have the authority to do so, and the Court so held and granted a motion to dismiss the indictment.

In doing so, the Court stated:

"It necessarily follows that the special grand jury which returned the indictment in the instant case was not summoned according to the statutory mandate, but was illegally constituted, and the resulting indictment was a nullity. The right to a lawful grand jury flows directly from the Constitution, and, in the opinion of the Court, violation of the right in these circumstances is prejudicial per se."

We respectfully submit that if the grand jury which returned the indictment upon which the petitioner was tried, convicted, and sentenced was not legally impaneled, then the indictment was a nullity, and the subsequent proceedings thereon clearly and unequivocally deprived him of due process of law.

The other branch of this question is, then:

WAS THE GRAND JURY WHICH INDICTED THE PETITIONER LEGALLY IMPANELED?

Section 2939.17 of the Ohio Revised Code (See Appendix G) has been enacted by the Ohio General Assembly to implement the Ohio Constitution insofar as grand juries are concerned.

It is essential to an understanding of the instant case to differentiate between the two separate—and entirely different—situations which are dealt with by this section

in impaneling a new grand jury. There is a statutory condition precedent to each of the two reasons for calling of a new grand jury, neither of which was present in the instant case.

In reverse order so as to quickly dispose of one of the two situations, the second sentence of Section 2939.17 of the Ohio Revised Code specifically provides:

"Whenever the governor or general assembly directs the attorney general to conduct any investigation or prosecution, the court of common pleas or any judge thereof, on written request of the attorney general, shall order a special grand jury to be summoned, and such special grand jury may be called and discharge its duties either before, during, or after any session of the regular grand jury, and its proceedings shall be independent of the proceedings of the regular grand jury of the same force and effect."

There is no contention in the instant case—nor could there be—that the grand jury which returned the indictment upon which petitioner was tried, convicted, and sentenced, was impaneled as a result of the governor or the general assembly directing the attorney general to conduct any investigation or prosecution. The legality of the grand jury which returned the indictment in the instant case therefore stands or falls upon the first sentence of Ohio Revised Code Section 2939.17, which reads as follows:

"After the grand jury is discharged, the court of common pleas, when necessary, may order the drawing and impaneling of a new grand jury, which shall be summoned and returned as provided by section 2939.03 of the Revised Code and shall be sworn and proceed in the manner provided by sections 2939.06 to 2939.24, inclusive, of the Revised Code."

In the instant case the regular grand jury was not

discharged. The Court will note from the entry printed herein as Appendix D that the regular grand jury was *discontinued* "for the reason that a Special Grand Jury has been ordered drawn by this Court due to the needs of public business."

As pointed out before, the condition precedent for the impaneling of a Special Grand Jury upon the direction of the governor or general assembly was not present.

The reason given for "discontinuance" of the regular grand jury was that a Special (new) Grand Jury had been ordered drawn, but a new grand jury may only be statutorily drawn after the (regular) grand jury is discharged. It is self-evident that the condition precedent to calling a new grand jury cannot be given as the reason for "discontinuing" the regular grand jury. See Appendices D, E, F.

The stipulation (Appendix F) provides that the regular grand jury had been *"discontinued"*. It has been expressly held, in *State v. Schwab,* 109 O.S. 532, that the Court of Common pleas has authority after the disposition of matters pending at the beginning of the term to *recess* the grand jury for such further business as may arise during the term. Needless to say, the Court also has the inherent power to *discharge* the grand jury, but it is a prevailing custom to retain the grand jury during the entire period of the term of court, and to discharge it only at the end thereof. Whether the "discontinuance" was a "recess" or a "discharge" is not clear, but if the discontinuance was only a recess, the grand jury and this indictment which it returned, were void ab initio.

In this regard, it has been held also that a challenge to a special grand jury should be sustained where it appeared that immediately after the regular grand jury was discharged a special grand jury was called because the prose-

cuting attorney felt that some cases he had to present might be more favorably considered by a new jury than they would be by the regular grand jury. See *State v. Weible,* 25 ONP(NS) 564.

In the instant case, the alleged offense occurred on *January 18, 1961;* the indictment was returned by a grand jury impaneled on *June 6, 1962* after the discontinuance of the regular grand jury on June 1, 1962.

Another important point to which we direct the Court's attention is the difference in language used by the Ohio legislature with regard to the two situations within the same code section. In the case of the "special" grand jury, requested by the attorney general, the court of common pleas *OR a judge thereof* may summon the grand jury, while in the case of a "new" grand jury, after discharge, *"THE COURT OF COMMON PLEAS,* when necessary, may order the drawing and impaneling of a new grand jury" (Emphasis added).

We respectfully submit the only possible interpretation allowed is that if the legislature had intended that a single judge of a multi-judge court of common pleas could summon a "new" grand jury, it would not have added "or any judge thereof" in connection with a "special" grand jury. "The expression of one excludes the other" was never more clearly demonstrated.

The stipulation (Appendix F) establishes that the "new" grand jury was ordered drawn by a single judge of the Common Pleas Court of Scioto County, Ohio without consultation with or concurrence of the other judge.

The establishment of the procedure for calling and organizing grand juries has been left from time immemorial to the legislative body, which in order to protect the citizens from unfounded accusation has always guarded with scrupulous care the selection, return, and impaneling of such

bodies. See *State ex rel. Doerfler v. Price, 101 O.S. 50; Doyle v. State, 17 Ohio 222.*

We therefore respectfully submit that the grand jury which returned the indictment upon which petitioner was convicted and sentenced was not a "special" grand jury under the Ohio Statute, nor was it a "new" grand jury ordered drawn *after* the *discharge* of the regular grand jury in accordance with the statute. It was, therefore never legally impaneled and was a complete nullity; thus its indictments were fully vitiated.

CONCLUSION

Your petitioner respectfully submits that the petitioner was tried, convicted, and sentenced upon an indictment returned by a grand jury which, never having been legally impaneled in the first instance, did not exist and was a nullity. As a result of this illegal procedure, the petitioner's rights have been abridged by the State of Ohio and he has been deprived of due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,
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APPENDIX A

IN THE COURT OF APPEALS, SCIOTO COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JAMES O. PHIPPS,
Defendant-Appellant.

OPINION OF THE COURT OF APPEALS

(November 17, 1964)

COLLIER, P.J.

James O. Phipps, the defendant-appellant herein, and hereinafter referred to as the defendant, was indicted by the Grand Jury of Scioto County under an indictment containing three counts. The defendant was charged with using a false and fictitious name in the application for a certificate of title to a certain motor vehicle, the giving of a false and fictitious address in such application and a forgery of an assignment of a certificate of title for said motor vehicle, in violation of Section 4505.19, Revised Code.

The defendant filed separate special pleas to the indictment objecting to the jurisdiction of the Common Pleas Court of Scioto County of the subject matter in the indictment, on the ground that the special grand jury which returned the indictment had no legal existence; that the order for the drawing of the special grand jury was the individual act of one judge of a two-judge court, without consultation with or concurrence of the other judge of the Common Pleas Court. These special pleas to the indictment were overruled.

The defendant then petitioned the Supreme Court of Ohio for a writ of prohibition to restrain the Common Pleas Court of Scioto County from proceeding with this cause for want of jurisdiction. The Supreme Court sustained a demurrer to defendant's petition on the ground that the defendant had an adequate remedy at law by way of appeal.

The defendant was found guilty on all three counts in a trial by jury, his motion for a new trial was overruled and the sentence of the court was imposed. The appeal on questions of law to this court followed.

The assignments of error will be considered in the order set forth in defendant's brief. In the first and second assignments of error the defendant claims the trial court erred in overruling the defendant's motions to quash the indictment and his plea in abatement to the indictment in which the defendant contended that the indictment was a nullity for the reason the order to draw the special grand jury was signed by only one of the two judges of the Common Pleas Court of Scioto County.

The question presented by these two assignments of error is whether or not a single judge of a two-judge court had authority to sign the order for the drawing of the special grand jury without the concurrence of the other judge. The record shows, by stipulation, that such order was signed on June 1, 1962, by the Honorable Lowell C. Thompson, one of the two judges of the Common Pleas Court of Scioto County. Section 2939.04, Revised Code, provides:

> "The Court of Common Pleas may order the drawing of a special jury to sit any time public business requires it."

and Section 2939.17, Revised Code, provides:

> "After the Grand Jury is discharged, the Court of Common Pleas, when necessary, may order the drawing and empanelling of a new Grand Jury,"

This statute unquestionably authorizes the Common Pleas Court to draw and empanel a new grand jury "when necessary", but the specific question in the case at bar is whether the concurrence of both judges of a two-judge court is necessary to render such order valid.

Section 2301.01, Revised Code, provides for a Common Pleas Court in each county to be held by one or more judges. It will be observed that the statute uses the term, "the court of common pleas". A "court" has been defined as an incorporeal political being in one or more judges to sit at fixed times and places, attended by proper officers, pursuant to lawful authority, for the administration of justice. *State ex rel Hawke vs. LeBlond*, 108 O. S. 126, the first syllabus of which reads:

> "1. In any county in Ohio, where more than one judge of the court of common pleas hold office, the "court of common pleas" of such county may be constituted by one or more of the common pleas judges holding office in that county, and the judges so holding office have unlimited discretion to determine the number of judges who shall preside over any session of such court."

And on page 134 of the opinion, the court says:

> "Parties to litigation have no control or voice in determining the number of Common Pleas Judges who may preside over sessions of the court, that matter being within the unlimited discretion of the judges of each county respectively."

In our opinion, the official act of an individual judge of a Common Pleas Court composed of more than one judge is the act of the court; that it was never contemplated and is not necessary that a judge of such court would be required to confer with and have the concurrence of the other judge or judges in the performance of his judicial duties. See 14

O. Jur. 2d, 444, Section 17, on the subject of Courts. The first and second assignments of error are overruled.

Under the third and fourth assignments of error the defendant claims the court erred in permitting the state to amend the indictment. It appears that in complying with a request of the defendant for a bill of particulars, the prosecuting attorney gave the number of the certificate of title to the motor vehicle as 7344469, when the correct number was 7344459. The trial court permitted an amendment, stating the correct number of the certificate. Did the court err in allowing the correction of this apparent typographical error? Section 2941.30, Revised Code, provides that the court may at any time before, during or after a trial, amend the indictment or bill of particulars in form or substance, provided no change is made in the name or identity of the crime charged. This statute is very broad and authorizes the amendment of an indictment which charges every essential element of a crime. It is only when an indictment does not contain an essential element of a crime and it is sought to supply such essential element that an indictment may not be amended. 28 O. Jur. 2d, 525, Section 101; *State vs. Wozmiak,* 172 O. S. 517. Neither the name or the identity of the crime was changed and the defendant could not have been prejudiced by this amendment. The transaction involved only one automobile with the same description throughout the proceedings. These assignments are overruled.

For his fifth and sixth assignments of error the defendant claims error in the trial court's refusal to instruct the jury as requested by the defendant before argument that the burden was on the State to show, where the hand writing was admitted to be by the defendant, want of authority on the part of the defendant to execute such writing. The

defendant admitted the writing on the certificate but claimed he was authorized to write it.

The rule in Ohio is that in the trial of a criminal case it is not mandatory upon the trial court to give any instructions before argument. But under Section 2945.10 (E), Revised Code, if requested, special instructions, reduced to writing, are correct, pertinent and timely presented, they must be included at least in substance, in the general charge. *Grosswiler v. State,* 113 O. S. 46; *Wertenberber vs. State,* 99 O. S. 353; *State vs. Barron,* 170 O. S. 267. The court, in the general charge, said:

> "A false or fictitious name as used means a name knowingly used other than the one that should be on the application and *used with no authority from that particular person.* (Emphasis added). Obviously, if the State has not proved the above elements beyond a reasonable doubt the defendant should be acquitted on these counts."

Thus, it will be seen that the substance of defendant's request was embraced in the general charge and the defendant was not entitled to any further instructions. These assignments of error are overruled.

Under the seventh, eighth and ninth assignments of error the defendant contends the evidence in the record is not sufficient to support the verdict. The facts upon which the indictment was based, briefly stated, are that on January 18, 1961, Alex Daugherty, accompanied by Robert McKinney and Johnnie Parker, residents of Columbus, Ohio, all with criminal records, came to Portsmouth to trade a 1954 Cadillac automobile for not known by the police; that they went to the Jim Phipps Auto Sales Company used car lot, operated by the defendant, where the transaction was completed; that the certificate of title for the Cadillac automobile was transferred into the name of Carl Reynolds and that the street address stated in the certificate was fictitious.

The defendant's contention is that the Cadillac automobile was sold by him the next day to a stranger, who gave his name as Carl Reynolds; that the purchaser told the defendant he could not write and authorized the defendant to write his name and fill out the certificate. The testimony of Daugherty, McKinney and Parker, witnesses for the State, and the conflicting testimony of the defendant and his employee, Wade Fraley, as to the transaction, presented a factual question for determination by the jury. In such situation, the court may not disturb the verdict unless it clearly appears that there was a misapprehension of the facts as shown by the evidence. The jury obviously believed the testimony of the witnesses for the State and disbelieved the testimony of the defendant and his employee. The evidence adduced by the State sufficiently establishes all the essential elements of each crime charged in the indictment. These assignments of error are overruled.

In his tenth and eleventh assignments of error the defendant claims the trial court erred in permitting the Prosecuting Attorney to cross-examine the defendant on collateral matters relating to his acquaintance with Ellsworth Daugherty and his companions. The defendant admitted only a casual acquaintance with these men involved in the transaction upon which the indictment was based. The State was properly permitted to make inquiry on cross-examination of the defendant concerning other transactions, dealings and contacts with these same persons who testified that they had frequently visited defendant's used car lot and had social contacts with the defendant. We do not consider such matter as collateral. The answers elicited were relevant to the issue involved, the guilt or innocence of the defendant. In *Barnett vs. State*, 104 O. S. 298, on the subject of relevancy, we find this statement:

> "Any fact that makes more probable or less probable, where the probabilities are in question, renders such fact relevant as evidence, unless there be some positive, arbitrary rule declared by competent authority, such as a statute, or a long line of judicial decisions, based upon reason, to the contrary."

For other definitions of the term, see same authority. There is no merit in these assignments of error.

The eleventh and twelfth assignments of error are that the court erred in overruling the motion of the defendant in arrest of judgment on the grounds of want of jurisdiction and that the court erred in overruling defendant's motion for a new trial. Our conclusions above stated in considering the other assignments of error renders any further comment on these assignments of error unnecessary.

Having disposed of all the issues raised by the assignments of error, we conclude that the defendant had a fair trial, free from prejudicial error, and, therefore, the judgment is affirmed.

Judgment Affimed.

Brown and Carlisle, J. J., Concur.

COURT OF APPEALS JOURNAL ENTRY

(January 4, 1965)

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, Scioto County, Ohio, and was argued by counsel for the parties and upon consideration the Court finds no error prejudicial to the appellant, and, therefore, the judgment and verdict of the Court of Common Pleas is affirmed, and it is ordered that the appellant pay the costs herein, taxed at $.....

The appellant having given notice of his intention to appeal this cause to the Supreme Court of Ohio, it is ordered that the present stay of execution heretofore imposed and

the conditions of the same are continued to enable the appellant to perfect his appeal to the Supreme Court of Ohio, and pending disposition of said appeal in said Court.

The exceptions of appellant are noted to that part of the order affirming the judgment of the Common Pleas Court of Scioto County, Ohio.

APPENDIX B
THE SUPREME COURT OF THE STATE OF OHIO
(Rendered Opinion May 12, 1965)

Case No. 39361

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JAMES O. PHIPPS,
Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS FOR SCIOTO COUNTY

This cause, here on appeal as of right from the Court of Appeals for Scioto County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

THE SUPREME COURT OF THE STATE OF OHIO

Case No. 39361

Opinion

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JAMES O. PHIPPS,
Defendant-Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR SCIOTO COUNTY

It is ordered by the Court that this motion is overruled.

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

(Rendered Opinion June 23, 1965)

No. 39361

STATE OF OHIO,

Plaintiff-Appellee,

vs.

JAMES O. PHIPPS,

Defendant-Appellant.

REHEARING

It is ordered by the Court that rehearing in this case is denied.

APPENDIX D

CERTIFIED COPY OF JOURNAL ENTRY

Common Pleas Court, Scioto County, Ohio

June 1, 1962

No. 19154

At the May 1962 Term of said Court, the following proceedings were had on the 1st day of June 1962, to-wit:

IN THE MATTER OF THE MAY TERM 1962, GRAND JURY FOR SCIOTO COUNTY, OHIO.

On a former day the Grand Jury for the May Term, 1962, was summoned to appear for duty on Monday, the 4th day of June, 1962; it now appearing that it is unnecessary that said Grand Jury appear on said date, for the reason that a Special Grand Jury has been ordered drawn by this Court due to the needs of public business; it is ordered that said May Term Grand Jury be discontinued until further action of this Court.

LOWELL C. THOMPSON,
Judge of Common Pleas Court
Scioto County, Ohio.

The State of Ohio, Scioto County, Common Pleas Court

I, the undersigned, Clerk of the Common Pleas Court within and for said County, and in whose custody the Files, Journals and Records of said Court are required by the laws of the State of Ohio to be kept, do hereby certify that the foregoing entry is taken and copied from the journal of the proceedings of said Court; that the same has been compared by me with the original entry on said journal, and that it is a true and correct copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name officially, and affix the seal of said Court, at the Court House, in Portsmouth in said County, this 10th day of September A. D. 1965.

DOROTHY J. BREWER,
Clerk of said Court of Common Pleas

[Seal]

By VIRGINIA C. SHIELDS,
Deputy

APPENDIX E

CERTIFIED COPY OF JOURNAL ENTRY
Common Pleas Court, Scioto County, Ohio

June 1, 1962

No. 19154

At the May 1962 Term of said Court, the following proceedings were had on the 1st day of June 1962, to-wit:

IN THE MATTER OF SPECIAL GRAND JURY.

In appearing to the satisfaction of this Court that a Special Grand Jury is required due to the needs of public business, that is, to investigate and examine all matters relative to charges against the office of the Chief of Police of the City of Portsmouth, Ohio, and all other matters which may come to its attention. It is hereby ordered that a Special Grand Jury be drawn.

It is further ordered that the Clerk of this Court draw from the jury wheel the names of sixteen (16) persons to serve as said Grand Jurors upon said Special Grand Jury, and that a venire issue to the Sheriff of said County for said Jurors to appear before the Court of Common Pleas of said County at the Court house therein on the 6th day of June, 1962, at 9:30 o'clock A.M., and so from day to day until discharged.

LOWELL C. THOMPSON,
Judge, Court of Common Pleas
Scioto County, Ohio

The State of Ohio, Scioto County, Common Pleas Court

I, the undersigned, Clerk of the Common Pleas Court within and for said County, and in whose custody the Files, Journals and Records of said Court are required by the

laws of the State of Ohio to be kept, do hereby certify that the foregoing entry is taken and copied from the journal of the proceedings of said Court; that the same has been compared by me with the original entry on said journal, and that it is a true and correct copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name officially, and affix the seal of said Court, at the Court House, in Portsmouth in said County, this 10th day of September A. D. 1965.

DOROTHY J. BREWER,
Clerk of said Court of Common Pleas

[Seal]

By VIRGINIA C. SHIELDS,
Deputy

APPENDIX F

IN THE COURT OF COMMON PLEAS, SCIOTO COUNTY, OHIO

No. 19168

STIPULATION

STATE OF OHIO,

Plaintiff,

vs.

JAMES O. PHIPPS,

Defendant.

[Filed January 31, 1964]

It is stipulated by the Prosecuting Attorney for Scioto County, Ohio, and counsel for the defendant, James O. Phipps, that the journal entries bearing date of June 1, 1962, contained in the transcript of the journal and docket entries in this cause, which entries relate to the discontinuance of the Grand Jury for the May term of 1962 and the entry relating to the calling of the Special Grand Jury ordered to report on the 6th day of June, 1962, were entered by the Honorable Lowell C. Thompson pursuant to the request of the Prosecuting Attorney of Scioto County, Ohio, and that said action was taken without consultation or the concurrence of the other Judge of the Common Pleas Court of Scioto County, Ohio, and at the time of said action there were two Resident Judges of the Common Pleas Court of Scioto County, Ohio, under the authority of the laws of the said State of Ohio. It is further stipulated that said action of the Honorable Lowell C. Thompson was taken pursuant to the authority obtained in Section 2939.04 of the Revised Code of the State of Ohio.

It is further stipulated that the above action and order of Judge Thompson was pursuant to his finding that a Special Grand Jury was required due to the needs of the public business, that is to investigate and examine all matters relating to charges against the Office of the Chief of Police of the City of Portsmouth, Ohio, and all matters which may come to its attention. It is further stipulated that the above may be included in the Bill of Exception to be hereafter filed in this cause.

EVERETT BURTON,
Prosecuting Attorney,
Scioto County, Ohio
ERNEST G. LITTLETON,
Attorney for Defendant,
James O. Phipps

THE STATE OF OHIO
Scioto County, ss.

I, Dorothy J. Brewer, clerk of the court of common pleas within and for said county, hereby certify that the above and foregoing is truly taken and copied from the original Stipulation now on file in my office.

Witness my hand and seal of said court this 10th day of September A.D. 1965.

DOROTHY J. BREWER,
Clerk

[Seal]

By VIRGINIA C. SHIELDS,
Deputy

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

PART I

Amendment 14: Section 1, Clause 3: Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PART II

Article 1, Section 10, Constitution of the State of Ohio:

(Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases.)

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person with counsel; to demand the nature and cause of the accusation against him; and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposi-

tion by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended Sept. 3, 1912).

PART III

Page's Ohio Revised Code 2939.17. After the grand jury is discharged, the court of common pleas, when necessary, may order the drawing and impaneling of a new grand jury, which shall be summoned and returned as provided by Section 2939.03 of the Revised Code and shall be sworn and proceed in the manner provided by sections 2939.06 to 2939.24, inclusive, of the Revised Code. Whenever the governor or general assembly directs the attorney general to conduct any investigation or prosecution, the court of common pleas or any judge thereof, on written request of the attorney general, shall order a special grand jury to be summoned, and such special grand jury may be called and discharge its duties either before, during, or after any session of the regular grand jury, and its proceedings shall be independent of the proceedings of the regular grand jury but of the same force and effect.

PART IV

Page's Ohio Revised Code Section 4505.19. No person shall:

(A) Alter or forge any certificate of title, or manufacturer's or importer's certificate to a motor vehicle, or any assignment of either, or any cancellation of any lien on a motor vehicle;

(B) Hold or use such certificate or assignment or cancellation knowing the same to have been altered or forged;

(C) Procure or attempt to procure a certificate of title to a motor vehicle, or pass or attempt to pass a certificate of title or any assignment thereof to a motor vehicle, knowing or having reason to believe that such motor vehicle has been stolen;

(D) Sell or offer for sale in this state a motor vehicle on which the motor number or manufacturer's serial number has been destroyed, removed, covered, altered, or defaced with knowledge of such destruction, removal, covering, alteration, or defacement of said motor number or manufacturer's serial number;

(E) Use a false or fictitious name or give a false or fictitious address or make any false statement in any application or affidavit required under sections 4505.01 to 4505.19, inclusive, of the Revised Code, or in a bill of sale or sworn statement of ownership, or otherwise commit a fraud in any application;

(F) Purport to sell or transfer a motor vehicle without delivering to the purchaser or transferee thereof a certificate of title, or a manufacturer's or importer's certificate thereto, assigned to such purchaser as provided for in such sections.

Page's Ohio Revised Code Section 4505.99.

(A) Whoever violates section 4505.18 of the Revised Code shall be fined not more than two hundred dollars or imprisoned not more than ninety days, or both.

(B) Whoever violates section 4505.19 of the Revised Code shall be fined not more than five thousand dollars or imprisoned in the county jail or workhouse not less than six months nor more than one year or in the penitentiary not less than one nor more than five years, or both.

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No. 627

IN THE

Supreme Court of The United States

OCTOBER TERM, 1965

JAMES O. PHIPPS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

EVERETT BURTON,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 627

JAMES O. PHIPPS,

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vs.

STATE OF OHIO,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The following Brief is submitted in opposition to the petition of James O. Phipps praying for a Writ of Certiorari to be issued by the Supreme Court of the United States to review the judgment of the Supreme Court of the State of Ohio entered in the case of State of Ohio vs. James O. Phipps May 12, 1965, and denying a motion for rehearing on June 23, 1965, being Case Number 39361.

STATEMENT OF THE CASE

The statement of the case as set forth by counsel for petitioner is substantially correct insofar as it relates to the matters set forth as the basis for the requested writ.

ARGUMENT

The petitioner presents his argument in two segments, to-wit:

I. If the petitioner was convicted and sentenced upon an indictment returned by a grand jury which was not legally constituted, was he deprived of due process of law?

II. If so, was the grand jury in question legally constituted?

We concur with petitioner's answer to the first question, in that if the petitioner was convicted and sentenced upon an indictment returned by a grand jury which was not legally constituted, he would have been deprived of due process of law. In fact, the overwhelming weight of relevant authority would seem to have obviated this as a controvertible question of law.

The only question, therefore, that need be considered is, "Was the grand jury legally constituted?"

Petitioner has supplied the Court with a copy of Ohio Revised Code Section 2939.17, and rests his case on the fact that the Court, in the entry dismissing the regular grand jury, used the term, "discontinued," rather than the word, "discharged," as used in that Section.

Actually, the special grand jury was not impanelled under authority of Ohio Revised Code Section 2939.17, and the provisions of that Section have no bearing on this appeal.

The special grand jury was impanelled by the Court under the provisions of Ohio Revised Code Section 2939.04, dealing with Grand Jurors, which provides, in part, "The Court of Common Pleas may order the drawing of a special grand jury to sit at any time public business requires it." (See Appendix A for full text of statute.)

A stipulation entered into by the parties which is included by petitioner in his Brief as "Appendix F" provides in

part: "It is further stipulated that said action of the Honorable Lowell C. Thompson was taken pursuant to the authority obtained in Section 2939.04 of the Revised Code of the State of Ohio. It is further stipulated that the above action and order of Judge Thompson was pursuant to his finding that a Special Grand Jury was required due to the needs of the public business, that is to investigate and examine all matters relating to charges against the Office of the Chief of Police of the City of Portsmouth, Ohio, and all matters which may come to its attention. It is further stipulated that the above may be included in the Bill of Exception to be hereafter filed in this cause."

The Court impanelled the special grand jury in this instance because it was believed that investigation of charges against the Chief of Police of the City of Portsmouth, Ohio, and related matters, would be extremely time-consuming, and would constitute an undue burden on the members of the regular grand jury. The records of the Court support this, in that the special grand jury remained in constant session for a period of fourteen days.

It is therefore respectfully submitted that the reliance upon the use of the term "discontinued" instead of "discharged" has no relevancy to this proceeding.

The Court of Common Pleas acted under the direct statutory authority contained in Ohio Revised Code Section 2939.04. At the time of impanelling the special grand jury the Court specifically found that such action was required, "due to the needs of public business."

Petitioner does not contend that the special grand jury was irregularly summoned. As he states in his Brief on page 3, the Court ordered the Clerk to summon the same by drawing from the jury wheel the names of sixteen persons to serve as a special grand jury. This was a departure

from former practices, and resulted in the passage by the Ohio Legislature of Revised Code Section 2939.02, (effective August 5, 1963) which now makes it mandatory for all grand jurors to be selected by means of the jury wheel. See Appendix B.

All of the cases cited by petitioner deal with matters not relevant to the appeal, with the exception of two, which might possibly be misconstrued as having a bearing on the facts of this case. Although the printed syllabus in the case of *State vs. Weible*, 25 ONP (NS) 565, decided October, 1925, by the Court of Common Pleas of Summit County, Ohio, appears to support petitioner's position, it in fact does not. On page 10 of his Brief, petitioner states: "In this regard, it has been held also that a challenge to a special grand jury should be sustained where it appeared that immediately after the regular grand jury was discharged a special grand jury was called because the prosecuting attorney felt that some cases he had to present might be more favorably considered by a new jury than they would be by the regular grand jury." A closer examination of the case reveals that, 1) The Court was there concerned with the interpretation of specific statutory provisions not involved in this appeal; and, 2) The Court specifically found as stated on page 571, "The record does not disclose that the men constituting the special grand jury were served or called by the sheriff of the county, from the bystanders and neighboring citizens, as provided by law; and, as far as the record discloses, there was no legally constituted grand jury; and, as far as this Court knows from the record, there was no grand jury."

Similarly, in the case of *United States of America v. Wallace and Tiernan, Inc., et al.*, 234 Fed. Suppl. 780, cited on page 8 of petitioner's Brief, the District Court in making

the determination that the special grand jury "was not summoned according to stautory mandate, but was illegally constituted," did so by reason of its finding that specific requirements of the Criminal Code and the Federal Rules of Criminal Procedure were not adhered to, to-wit, the requirement that "only the Chief Justice, or in his absence, the presiding judge, may actually exercise the authority."

In the instant case, the judge acted under specific statutory authority, and no violation of this authority is set forth by the petitioner.

Petitioner raises one other question, one which was the principal issue raised by him unsuccessfully in all prior proceedings in the Court of Common Pleas of Scioto County, Ohio, the Fourth District Court of Appeals of Ohio, and the Supreme Court of Ohio, to-wit: Can one of the judges of a two judge Court of Common Pleas summon a special grand jury? Again he has referred to the wrong section of the Ohio Revised Code. The grand jury in this case was, as previously noted, summoned pursuant to the provisions of Section 2939.04, *not* Section 2939.17 of the Ohio Revised Code. The Court of Appeals disposed of the contention as set forth in petitioner's Brief, Appendix A, on page 14 and 15, which concludes, "In our opinion, the official act of an individual judge of a Common Pleas Court composed of more than one judge is the act of the court; that it was never contemplated and is not necessary that a judge of such court would be required to confer with and have the concurrence of the other judge or judges in the performance of his judicial duties." This was the major issue which petitioner raised in the Supreme Court of Ohio.

By reason of the foregoing, it is respectfully submitted that the special grand jury which is the subject of this appeal was legally summoned pursuant to the laws of the

State of Ohio, and was a legally constituted and valid grand jury.

Since no contention is made by petitioner that the grand jury in question was not fairly and legally constituted; that no effort was made to select persons for the panel by some discriminatory means in order to prejudice his rights, it is further submitted that no issue is here raised involving the deprivation of the petitioner's liberty without due process of law; and that the nature of the matters complained of would involve no substantive question of law, the Supreme Court of Ohio having duly considered and passed judgment upon all procedural issues raised relative to the impanelling of the grand jury in question.

CONCLUSION

It is respectfully submitted that the petitioner's rights have not been abridged by the State of Ohio, and it is therefore reqested that this appeal be denied.

Respectfully submitted,

EVERETT BURTON
Prosecuting Attorney, Scioto County
Room 310, Courthouse,
Portsmouth, Ohio

JOHN BELL MARSHALL
Assistant Prosecuting Attorney
Portsmouth, Ohio

ROBERT E. DEVER
Assistant Prosecuting Attorney
Portsmouth, Ohio

APPENDIX A

Page's Ohio Revised Code, Section 2939.04 Grand Jurors; compensation.

The compensation of grand jurors is the same as that prescribed for petit jurors by section 2313.34 of the Revised Code. Except in counties of less than one hundred thousand population according to the last federal census, in which counties the judge of the court of common pleas shall make rules and regulations thereto, a person who has served as a grand juror at a term of court is prohibited from serving again, either as a grand juror or petit juror, in that jury year in which the service is rendered, or in the next jury year. He is entitled to a certificate of exemption in like manner as a petit juror. The court of common pleas may order the drawing of a special jury to sit at any time public business requires it.

APPENDIX B

Page's Ohio Revised Code, Section 2939.02. Selection of Grand Jury.

Grand juries shall consist of fifteen persons, resident electors of the county. Persons to serve as grand jurors in the court of common pleas of each county shall be selected from the persons whose names are contained in the annual jury wheel, as prescribed by sections 2313.07, 2313.08, and 2313.35 of the Revised Code. At the time of the selection of the persons who are to constitute the grand jury, the commissioners of jurors shall draw from the jury wheel ballots containing the names of not less than twenty-five persons. The first fifteen persons whose names are drawn shall constitute the grand jury, if they can be located and served by the sheriff, and if they are not excused by the court, or a judge thereof. In the event any of the first fifteen persons whose names are so drawn are not located or are unable to serve and are therefore excused by the court or by a judge thereof, whose duty it is to supervise the impaneling of such grand jury, such judge shall then designate the person whose name next appears on the list of persons drawn, to serve in the place of the person not found or excused and shall so continue to substitute the names of the persons drawn in the order in which they were drawn, to fill all vacancies resulting from persons not being found or having been excused by the court or the judge thereof, until the necessary fifteen persons are selected to make up the grand jury. In the event that all of the names appearing on the list of persons drawn are exhausted before the grand jury is complete, the judge shall order the commissioners of jurors to draw such additional names as the judge determines, and shall proceed to fill such vacancies from such names in the order in which they were drawn.

The judge of the court of common pleas may select any qualified elector, whose name is not included in the annual jury list or on a ballot deposited in the jury wheel, to preside as foreman of the grand jury, in which event the grand jury shall consist of the foreman so selected and fourteen additional grand jurors selected from the jury wheel in the manner provided in this section.

END